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No. 90-1156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' SUPPLEMENTAL FILING

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April 9, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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Pursuant to Rule 15.7, respondents respectfully submit this response to petitioner's supplemental filing of April 6, 1991, which enclosed the decision of the Louisiana Court of Appeals for the Fourth Circuit in a parallel state proceeding (*Alliance for Affordable Energy, Inc. v. Council of the City of New Orleans*, 90-CA-0420), but characterized it in an argumentative and inaccurate manner.

The state court decision found that: (1) the Council's factual findings on the prudence matter were supported not merely by "substantial" evidence but by a "preponderance"; (2) the Council's rate order was not preempted; (3) there were no due process or other violations in the proceedings; (4) there was no commerce clause violation; and (5) the Council erred in

moderating the disallowance by considering its economic impact on NOPSI, so that the disallowance would have to be a larger amount.

The intermediate appellate decision has no immediate effect on petitioner's rates (the subject of the case here), because the decision does not become final for at least 30 days, and the suspense of finality would be automatically extended by a petition for rehearing and by a petition for review by the Louisiana Supreme Court, and until a final decision is rendered or review is finally denied. It may further be suspended pending application for review by this Court. La. Code Civ. Proc. Art. 2166 (West Supp. 1991) (reprinted in the appendix hereto).

Further, while petitioner's letter recites that the state court opinion rejected NOPSI's "facial" preemption claim on *res judicata* grounds, in fact the court conducted an independent analysis of NOPSI's preemption claim (Slip. Op. at 28-31), and found "no merit" in it (*id.* at 31), and only after doing so, as an alternative basis, indicated that *this* Court's prior holding in *NOPSI III* and the Fifth Circuit's decision thereafter rendered the issue *res judicata*. *Id.* at 31.

Finally, petitioner characterizes the opinion as demonstrating the need for the Court to intercede now to reverse the ruling of the Fifth Circuit here; but, in fact, the decision here of an intermediate state court shows that the state courts are responsibly dealing with *all* the issues in this matter, and that the determination of whether there is any need for review

by this Court can and should await the completion of that process.

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APPENDIX

APPENDIX

Louisiana Statutes

La. Code Civ. Proc. Ann. art. 2166 (West Supp. 1991)

A. Within fourteen days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the court of appeal for a rehearing. Within thirty days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the supreme court for a writ of certiorari. The judgment of a court of appeal becomes final and definitive if neither an application to the court of appeal for rehearing nor an application to the supreme court for a writ of certiorari is timely filed.

B. If any party files a timely application to the court of appeal for a rehearing, then the time within which any other party may apply to the supreme court for a writ of certiorari shall be extended until thirty days of the mailing of the notice of a denial of rehearing.

C. If a timely application for rehearing has been filed in the court of appeal and the court of appeal denies the application, the judgment becomes final and definitive unless an application for writ of certiorari to the supreme court is filed within thirty days of the mailing of the notice of a denial of rehearing.

D. If an application for certiorari to the supreme court is timely filed, a judgment of the court of appeal becomes final and definitive when the supreme court denies the application for certiorari. The supreme court may stay the execution of the judgment of the court of appeal pending a timely application for certiorari or an appeal to the United States Supreme Court.